LIBRARY
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1957

No. 279

ELSA W. DE WAGENKNECHT and N. V. EDMUND WAGENKNECHT'S HANDEL MAATSCHAPPIJ,

Petitioners—Expected Adverse Parties,

In the matter of the petition of MRS. HUGO STINNES, SR., to perpetuate her own testimony,

Respondent,

HERBERT BROWNELL, JR., Attorney General of the United States, and ATLANTIC ASSETS CORPORATION,

Respondents—Expected Adverse Parties.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RALPH G. ALBRECHT,
501 Fifth Avenue,
New York 17, N. Y.

JOHN GEYER TAUSIG,
Investment Building,
Washington 5, D. C.

Counsel for Petitioners

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Federal Rules Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	19
Appendix	21
Opinion of Court of Appeals	21
Rule 26, Federal Rules of Civil Procedure	29
Rule 27, Federal Rules of Civil Procedure	30
Rule 30, Federal Rules of Civil Procedure	32

CITATIONS

CASES:

Alderman v. *United States*, (1929) 31 F. 2d 499, cert. den. 279 U. S. 869, 49 Sup. Ct. 513, 73 L. Ed. 1008	7
Alford v. *United States*, (1931) 282 U. S. 687, 51 Sup. Ct. 218, 75 L. Ed. 624	3
Arizona v. *California*, (1934) 292 U. S. 341, 54 Sup. Ct. 735, 78 L. Ed. 1298	17
Hickman v. *Taylor*, (1947) 329 U. S. 495, 67 Sup. Ct. 385, 91 L. Ed. 451	3
Laverett v. *Continental Briar Pipe Co.*, (1938) 25 F. Supp. 80	6

PAGE

People v. *Becker*, (1914) 210 N. Y. 274, 104 N. E. 396 ..... 2, 7

Rea v. *Missouri*, (1873) 84 U. S. 532, 21 L. Ed. 707 7
Reilly v. *Pinkus*, (1949) 338 U. S. 269, 70 Sup. Ct. 110, 94 L. Ed. 63 3

Schwartz v. *Broadcast Music Inc.*, (1954) 16 F. R. D. 31 6

STATUTES:

28 U. S. C. § 1254(1) 2

Act of June 25, 1948, c. 646 (62 Stat. 929, 28 U. S. C. § 1291) 6

Trading with the Enemy Act, as amended (40 Stat. 411, 50 U. S. C. App. §§ 1-40) 2, 4

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 26 ..... 6, 7, 16
Rule 27 ..... 1, 3, 6, 7, 16
Rule 30 6
Rule 34 ..... 6, 13
Rule 54 6
Rule 73 6

TEXTBOOK:

4 Moore, Federal Practice (2d ed.) Sect. 27.09 .. 17

Supreme Court of the United States

OCTOBER TERM 1957

No.

ELSA W. DE WAGENKNECHT and N. V. EDMUND WAGENKNECHT'S HANDEL MAATSCHAPPIJ,
Petitioners—Expected Adverse Parties.

In the matter of the petition of MRS. HUGO STINNES, SR., to perpetuate her own testimony,
Respondent.

HERBERT BROWNELL, JR., Attorney General of the United States, and ATLANTIC ASSETS CORPORATION,
Respondents—Expected Adverse Parties.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Elsa W. de Wagenknecht and N. V. Edmund Wagenknecht's Handel Maatschappij pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above proceeding brought under Rule 27 of the Federal Rules of Civil Procedure.

Opinions Below

The informal opinions of the United States District Court for the District of Columbia are unreported. They are included in the court's Memorandum and Order filed

February 23, 1956 (R. 136)* and in its Memorandum and Order filed March 15, 1956 (R. 139). The opinion of the Court of Appeals (R. 573) is reported at 243 F. 2d 413 and printed in the appendix at p. 21 *infra*.

Jurisdiction

The judgment of the Court of Appeals was made and entered on April 18, 1957 (R. 583). The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the District Court abused its discretion and committed prejudicial error in granting respondent's motion to terminate the perpetuation of her testimony abroad under Rule 27, Federal Rules of Civil Procedure, because:

a) The court failed to give adequate consideration to the extraordinary difficulties that attended the cross-examination of respondent by petitioners' counsel, including the non-cooperative attitude of the witness and her physical and other handicaps which prevented a "searching, complete and advantageous cross-examination" *People* v. *Becker* (1914) 210 N. Y. 274, 104 N. E. 396.

b) The court failed to recognize the significant fact that respondent's testimony being perpetuated under Rule 27, was at the same time her actual testimony as the government's principal witness in the two pending actions brought by petitioners under Section 9 of the Trading with the Enemy Act against the Attorney General, for the return of their vested property. *Vide* pp. 11-12 *infra*.

c) The court's termination order cut off *in limine* the cross-examination of respondent on subjects with respect to which petitioners are entitled to considerable latitude.

---

* R. 1-572 correspond to pp. 1-572 of the Joint Appendix filed in the Court of Appeals which annexed R. 573-585 thereto.

and also resulted in undue restriction on petitioners' right to a fair and ample cross examination. *Reilly* v. *Pinkus* (1949) 338 U. S. 269, 70 Sup. Ct. 110, 94 L. Ed. 62; *Hickman* v. *Taylor* (1947) 329 U. S. 495, 67 Sup. Ct. 385, 91 L. Ed. 451; *Alford* v. *United States* (1931) 282 U. S. 687, 51 Sup. Ct. 218, 75 L. Ed. 624.

d) The conflicting claims of respondent and petitioners relate to substantial property interests vested by the Attorney General, valued at between 15 and 20 million dollars.

e) The demonstrable errors contained in the court's orders of February 23 and March 15, 1956 patently do not support the court's statement in its memorandum and order of February 23, 1956 that "the records and briefs in this case have been examined with care".

2. Whether under the unusual circumstances surrounding the taking of this deposition, a proper exercise of the court's discretion required it as a matter of equity, to defer its ruling terminating the deposition until the lapse of reasonable time disclosed whether respondent was able to resume her testimony.

Federal Rules Involved

The pertinent portions of Rules 26, 27 and 30, Federal Rules of Civil Procedure, are printed in the appendix at pp. 29-33 *infra*.

Statement

The petition seeks to review the judgment of the Court of Appeals which affirmed the order of the District Court terminating the taking of respondent's deposition.

This proceeding under Rule 27 F. R. C. P. was brought by respondent, Mrs. Hugo Stinnes, Sr., a German national and non-resident, for an order authorizing her to perpetuate her own testimony.

In her petition (R. 1) respondent states that she is over 82 years old and in frail health, that petitioners herein, Elsa W. de Wagenknecht (hereinafter referred to as "Mrs. Wagenknecht"), and N. V. Edmund Wagenknecht's Handel Maatschappij (hereinafter referred to as "the Dutch Corporation"), and also others, at various times had filed notices of claim with the Office of Alien Property, Department of Justice, for the return of property vested by the Attorney General under the authority of the Trading with the Enemy Act, and that on February 8, 1955, respondent also had filed a notice of claim with respect to substantially all of the property previously claimed by Mrs. Wagenknecht and the Dutch Corporation.

The value of this property is estimated at between 15 and 20 million dollars (R. 115). Petitioners also had filed suits for the return of this property, as permitted by Section 9 of the Trading with the Enemy Act (R. 92). These actions are now pending in the District Court.

Mrs. Stinnes concedes that she is not eligible for a return of any of said property, and that she is not qualified to bring an action under Section 9 of the Trading with the Enemy Act against the Attorney General (R. 2); but respondent states that if the Congress should enact legislation returning enemy property to its former owners, and if the Attorney General should return the vested property claimed by her to petitioners, respondent expects to bring one or more actions against Mrs. Wagenknecht, who is a national and resident of Mexico, the Dutch Corporation, the Attorney General of the United States, and Atlantic Assets Corporation, a Delaware corporation, as expected adverse parties.

Respondent's stated desire for perpetuating her testimony is to establish (a) that she is the widow and residuary legatee of the late Hugo Stinnes, Sr., and (b) that all or substantially all of the vested properties were included in the residuary estate of said Hugo Stinnes, Sr., or were other-

wise beneficially owned by her at the time of their vesting (R. 4).

Respondent, who is a resident of Muelheim, Germany, declined to perpetuate her testimony in Washington and desired instead to depose in Germany. Upon consent, the District Court on July 11, 1955 (R. 8) granted respondent's petition on terms.

The taking of the deposition commenced on August 30, 1955 in Duesseldorf. It was adjourned on September 27 to enable respondent to receive medical treatment in Hamburg by her physician, who certifies that Mrs. Stinnes has been in his continuous care for a duodenal ulcer condition since 1929 (R. 45). The deposition was resumed on October 11, and on October 16 it was stopped by respondent's physician. At that time petitioners' counsel had not completed his cross-examination of respondent.

In consideration of her age and the fact that she is a chronic sufferer from ulcers, when respondent testified, she did so at intermittent sessions* of two and one-half hours including the time taken by a recess. The examination of the witness herself took about two hours, although the time of the effective examination of respondent by counsel at each session was cut in half by the fact that every question had to be translated into German and every answer had to be translated into English.

On direct respondent testified on August 30, 31, September 2 and most of September 3. She was cross-examined on behalf of the Attorney General on September 3 and through most of September 6. Petitioners' counsel then cross-examined the witness intermittently in Duesseldorf until September 27, and later in Hamburg from October 11 to October 16. Thus the witness' cross-examination took place

*Respondent deposed in Duesseldorf at 19 short sessions, on August 30, 31, September 2, 3 (Saturday), 5 (Labor Day), 6, 8, 9, 12, 13, 14, 15, 16, 19, 20, 22, 23, 26 and 27; and in Hamburg at 6 equally short sessions, on October 11, 12 (Columbus Day), 13, 14, 15 (Saturday) and 16 (Sunday).

at 19 brief sessions over a period of 27 days, during which the effective cross-examination of petitioners' counsel was the equivalent of somewhat less than 19 hours (R. 89).

Upon respondent's motion under Rule 30(d)* the District Court, by its order of February 23, 1956 directed that the taking of the deposition be terminated. The order makes no reference to Rule 30(d) which provides for termination "upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party"; and the order is bare of any finding of bad faith or that the cross-examination was being conducted "in such manner" as "unreasonably" to oppress.

On motion of the Attorney General, the District Court's order of February 23, 1956 was resettled and modified on March 15, 1956 to eliminate an erroneous determination by the court patently prejudicial to him.

Petitioners appealed from the order of February 23, 1956 as resettled, by invoking the jurisdiction of the Court of Appeals under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. § 1291, and under Rules 54(a) and 73 F. R. C. P.

The Court of Appeals affirmed, ruling that the District Court had not abused its discretion in terminating the taking of the deposition, and that there had been ample opportunity to cross-examine respondent.

---

* Rule 30 does not apply to a proceeding under Rule 27. Of the rules included in Part V of the F. R. C. P. entitled "Depositions and Discovery", only Rules 34 and 35 have been made applicable to Rule 27 by the 1946 amendment to the Rules. The Court of Appeals (R. 573) seems to hold the contrary view, but the two cases cited in support relate to depositions under Rule 26. *Vide* *Schwartz* v. *Broadcast Music Inc.*, (S. D. N. Y. 1954) 16 F. R. D. 31; *Laverett* v. *Continental Briar Pipe Co.*, (E. D. N. Y. 1938) 25 F. Supp. 80. Rule 26 (b) provides that orders under Rule 30(b) and (d) apply to that Rule. There is no reference at all to Rule 30 in Rule 27. Moreover, the language of Rule 30(b) and (d) restricts its application to a deposition taken in a *pending action*, i.e. under Rule 26.

Reasons for Granting the Writ

I.

This petition should be granted because petitioners have not had "fair and ample opportunity" to cross-examine respondent. The judgment appealed from must stand or fall upon the correctness of the court's finding that petitioners have had that opportunity. But such finding to have validity, must be judged not according to the standard of discretion exercised by a trial court concerned with problem of litigation falling under Rule 26. Its correctness can be determined only in the sound discretion of a court that has given proper consideration to the facts and circumstances under which the deposition was taken in this particular perpetuation proceeding under Rule 27. (*Vide* pp. 16-17 *infra* for statement of differences between a deposition taken under Rule 26 and testimony perpetuated under Rule 27). This determination can be made only from an examination of the deposition itself against the background of the circumstances surrounding its taking.

Respondent herself initiated this proceeding in order to perpetuate her own testimony. The rule of this court is that greater latitude is permitted in the cross-examination of a party who takes the stand than in the case of other witnesses. *Rea* v. *Missouri* (1873), 84 U. S. 532, 21 L. Ed. 707; *Alderman* v. *U. S.* (CA-5, 1929), 31 F. 2d 499, cert. den. 279 U. S. 869, 49 Sup. Ct. 513, 73 L. Ed. 1008. While the extent of cross-examination is always within the sound discretion of the court, it is nevertheless subject to the rule that a party "should have had an opportunity for a searching, complete and advantageous cross-examination" *People* v. *Becker*, *supra*. This opportunity petitioners have not had.

The Court of Appeals cited "the advanced age of the witness, the delicate state of her health and the probable adverse effect upon her health of further cross-examination" as making proper the termination of her deposition.

But the facts of respondent's age and state of health may not arbitrarily be cited as grounds for denying or limiting petitioners' right to cross-examination. Age and health are facts that must be considered together with all other facts, in determining whether petitioners' counsel has had ample opportunity to complete the arduous task of cross-examining this respondent that confronted him abroad.

The state of respondent's health was fully known to all parties at the time her petition was filed below (R. 9). Her ulcer condition was not brought about by her deposition, although it was undoubtedly aggravated by the strain and excitement of testifying.* When the deposition was stopped in October 1955, respondent's physician, in reply to counsel's inquiry, was unable to estimate when the examination of the witness might be resumed (R. 73). There is no warrant for concluding, without further inquiry, that a physician would not now certify—almost two years later—that the witness may with safety complete her deposition.** *Cf.* petitioners' suggestion on this point to the District Court (R. 104).

Under the unusual circumstances surrounding the taking of this deposition, a proper exercise of the court's discretion required it as a matter of equity, to defer its ruling terminating the deposition until the lapse of a reasonable time disclosed whether respondent was able to resume her testimony. Such deferment would adequately and equitably have resolved this question, and would resolve it even at this date, since such deferment would not be prejudicial to any party to this proceeding.

A cardinal fact in the consideration of the problem is that of necessity respondent will be the chief witness for

---

* When respondent first moved on September 26, 1955 to terminate her deposition, her physical condition was not a motivating factor and was not referred to in the moving affidavit (R. 15-33).

** There was some evidence before the court bearing on the degree of respondent's recovery as early as December 1955 (R. 128). Moreover, for the past 28 years respondent has made periodic recoveries (R. 45).

herself in any future action to be brought, and that her testimony already has made her the principal defense witness for the Attorney General in the pending actions brought against him by Mrs. Wagenknecht. The present occasion may be, and probably is, the only opportunity that petitioners will have to confront the witness. It is of utmost importance that their right to cross-examine her is not limited, since her testimony is general and concerns issues of great import and valuable property interests.

The transcript of respondent's testimony confirms that the witness was not cooperative under cross-examination; and that she gave lengthy recitals as her answers and volunteered long statements before a question could be asked (*vide* e.g. R. 508). The transcript records many answers that were one-half page or more in length. Some were one and one-half and two pages long (*vide* e.g. R. 508-9, 509-10, 547, 548, 550-1, 557-8). Since respondent deposed in German, all this added greatly to the burden of translating her answers into English* and reduced the time available for cross-examination. Throughout her deposition, respondent required the use of a hearing aid. The combination of her impaired hearing, her frequent inability to hear the question or to comprehend the same when her mind wandered while under the influence of sedatives (R. 71), her failure to testify in reasonably brief form, and the necessity for translating everything consumed a substantial part of the brief hearing time.**

To summarize, although respondent testified for about two hours each session, it may fairly be submitted that the effective cross-examination was equivalent to only one hour's questioning of an average witness, and even less. The cross-examination was not continuous and, of necessity,

---

* *Vide* R. 549 where one answer required 30 minutes to translate. Other translations were equally time consuming (R. 508-9, 509-10, 550-1, 557-8).

** *Cf.* statement made by petitioners' counsel on the record (R. 370).

time was spent in picking up the threads of examination from the previous session. This lack of continuity reduced effective cross-examination to less than 19 hours in the course of 19 sessions in 27 days, during which petitioners' counsel unsuccessfully sought to complete a "searching, complete and advantageous cross-examination".

Respondent's deposition concerns itself with the basic issue of who is possessed of the right to property interests, worth between 15 and 20 million dollars (R. 90), vested by the Attorney General under the Trading with the Enemy Act. Mrs. Wagenknecht, as successor of her deceased husband Don Edmundo Wagenknecht, and the Dutch Corporation had already filed claims for the return of their vested property when respondent, who earlier in 1948 had filed a claim (R. 500) to a few items of property not disputed by petitioners, on February 8, 1955 for the first time filed another claim (R. 296) that included substantially all of petitioners' property.

Upon direct examination respondent asserted that during the lifetime of her husband, who died in 1924, a "furtive scheme" was hatched to camouflage her husband's assets outside of Germany so that his ownership of them would not be apparent. After the death of her husband, respondent claimed that she carried out and maintained this scheme to camouflage the foreign assets. She claimed that certain persons and corporations were "straw men" or "trustees" who held the alleged camouflaged property for her husband, and later for her as his heir. It is substantially this alleged camouflaged foreign property for which petitioners and respondent have filed claims. Among the alleged "trustees" are named Don Edmundo Wagenknecht, the Dutch Corporation, and later, Mrs. Wagenknecht herself as successor in interest to Don Edmundo.

No effort was made by the witness on direct to produce any documentary proof in the form of an inventory or a schedule of assets of her husband's estate inherited by her, or otherwise to substantiate her unsupported story.

It is simply not credible that Mrs. Stinnes' records do not include a list of such assets. It is a matter of public knowledge that Hugo Stinnes, Sr., was a leading German industrialist who had created an industrial empire. A record of his holdings and possessions must be available to his widow or those authorized to act for her. It is also not credible that a business man of the background and experience of the late Hugo Stinnes, and also respondent, should not have taken back from alleged "trustees" some written admission of their trust.

The last will of her husband (R. 258) established respondent as his heir; but as no written proof was offered to show what property she had inherited, the burden of developing and proving the facts for which the deposition was being taken (R. 4) would seem to have been placed with premeditation on petitioners. Having been placed in that position, petitioners' counsel had no choice but to assume the time-consuming burden of attempting to develop the facts by means of documentary evidence under the witness' control but which she had not offered. To this end, petitioners repeatedly demanded the production of documents which it was believed would help to establish the true facts bearing on the principal issues of the deposition, and to expedite the taking of the same. As none of this relevant and important documentation was produced, petitioners have not yet had the opportunity to cross-examine the witness on the basis of the same.

Equally if not more important is the fact the respondent's testimony was in direct conflict with the prior depositions of (1) her son, Hugo Stinnes, Jr., who as his mother's attorney-in-fact had managed her affairs and the family partnership and business from the death of his father until 1950; (2) her son, Otto, who succeeded his brother Hugo in 1950 and still is his mother's attorney-in-fact and manager of the family partnership, and (3) Wilhelm Unger, the long-time director of finance of the Stinnes family partnership and business enterprises. These depositions were taken in 1953 and 1954 on behalf of peti-

tioners and the Attorney General in actions (*Civil Action No. 1734-52* and *Civil Action No. 4920-52* pending in the District Court) brought by petitioners against the Attorney General under the Trading with the Enemy Act, for the return of their vested property now belatedly also claimed by respondent (R. 92, 330-1).

It is vital to petitioners that it be recognized—which the court below failed to do—that respondent's testimony perpetuated under Rule 27 is at the same time her actual testimony as the principal defense witness for the government in these actions and that respondent's deposition is available to the Attorney General upon the trial of these actions (Rule 27(a)4). Under these circumstances, petitioners must be accorded wide latitude to conduct a "searching, complete and advantageous" cross-examination to test respondent's story against all available written evidence.

The testimony of respondent on direct is in effect a fantastic confession of alleged wrong-doing (R. 297-8) on the part of herself and her deceased husband. She testified that in 1950 she decided to relieve her conscience of her wrong-doing that extended over thirty years, during which she filed fraudulent tax returns with the German authorities pursuant to the "furtive scheme" to camouflage the true ownership of her husband's property. This extraordinary confession has been perpetuated with nothing to support the oral statement of an elderly woman, all of whose affairs and property since the death of her husband in 1924, have been controlled and managed by her son Hugo (until 1950) and her son Otto (after 1950) whose testimony conflicts with their mother's (R. 92).

Respondent has argued that as she has confessed her misdeeds, it was improper to question her with respect to her fraudulent income tax and property tax declarations. Petitioners do not concede that respondent's tax declarations are consistent with the alleged "furtive scheme" to camouflage; and the fact that she admits that her returns

are false and fraudulent, does not exclude the possibility that they may be highly relevant in relation to other facts, to show that her story is without foundation, and to destroy or throw doubt on her credibility.

On direct respondent testified further that her brother Don Edmundo Wagenknecht, Mrs. Wagenknecht's deceased husband, was without means, a bankrupt and living on her charity allegedly at the time when some of the property in question was acquired. In support of that testimony she testified (R. 288) that their father (Consul Wagenknecht), who died in 1922, thought so little of his son's business ability that he refused to appoint him executor of his substantial estate (*cf.* R. 430-2, 405) and appointed instead his brother-in-law, Hugo Stinnes, Sr., and also respondent as her husband's successor. Both on direct and cross-examination Mrs. Stinnes emphatically repeated that testimony (R. 411). But later respondent admitted (R. 420) that her prior testimony was untrue and that her brother had been appointed co-executor of his father's estate together with her husband.

Cross-examination to obtain a similar retraction of respondent's unsupported statements that her brother at no time was possessed of substantial means, has not yet succeeded. It is a vital issue for petitioners to establish that Don Edmundo was a person of substance and means as the owner of the property interests vested by the Attorney General.

It has been charged that petitioners' oral requests for documentary proof were improper, since application should have been made to the District Court under Rule 34. Despite her objections, some documents were produced by respondent. Obviously, petitioners' demands made abroad for the production of documents were actually in the interest of expediting the deposition.

A substantial bar to the cross-examination of respondent on the important issues that may have to be met, was

created by her failure or refusal to produce such important documentary evidence as the following:

(1) The inventory of the estate of Hugo Stinnes, Sr. (*vide* petitioner's final demand therefor at R. 535-6), or any other document listing the property inherited by respondent, such as e.g. the records of the arbitration court that determined the amount to be paid to Edmund Stinnes in 1926 as his share of his father's estate (R. 342); a statement of respondent's personal property holdings included in her capital account in the family partnership (R. 347); and the property tax declarations and reports of respondent from 1926 to the present and her income tax declarations and reports for the three specified years demanded (R. 347).

According to German practice, a taxpayer files a tax declaration (*Steuererklärung*), and the tax authorities, after auditing the same, mail to the taxpayer a return (*Steuerbescheid*) which fixes the amount of the tax. In the case of more substantial taxpayers like Mrs. Stinnes there is included with a property tax declaration, an annex giving the details of property owned; and an income tax declaration always includes a statement of the property from which income has been received (R. 461-2). Upon demand respondent produced numerous tax declarations and reports, but in substantially all of these cases the important annexes itemizing her property and sources of income were missing.

(2) Respondent's last will and testament. At the end of the Hamburg deposition, her attorney announced (R. 537) that a copy of the will *in German* had been handed "without comment" to the American Consul in Duesseldorf, who in his presence had sealed the same in an envelope which he had agreed to attach to the original deposition.

(3) Copies of all correspondence and enclosures between respondent and her son Otto as her attorney-in-fact

on the one part, and the German authorities on the other part, to whom the witness testified, notice of her alleged fraudulent tax returns had been given,—but not until the taking of her deposition had commenced (R. 475, 482). Respondent testified that it was in 1950 that the witness decided to relieve her conscience and to make a clean breast of her alleged fraud extending over thirty years. It is important that full opportunity be accorded petitioners to examine the witness closely to test the truth of her testimony and to determine the reasons and circumstances that delayed for five years her alleged confession to the German authorities.

(4) All written proof of respondent's alleged ownership of camouflaged foreign property. Repeated demands made for the production of written proof to support her all-encompassing claim evoked completely evasive answers. She testified:

> "If proofs should be missing today, then I shall have them at my disposal whenever they may be required" (R. 488).
>
> "I shall endeavor to present proofs within such time, but I doubt that they will be available in such a short time" (R. 490).

And the following curious statement was volunteered by her counsel (R. 538):

> "The petitioner has responded to your blanket request for the production of all proofs of ownership which she may have of her camouflaged foreign property."

This statement to the contrary notwithstanding, not even one document has been produced to corroborate the witness' claim that she is the owner of the property for which petitioners have filed claims and instituted actions that are now pending in the District Court.

II.

The decision below should be reviewed because there has been no recognition of the essentially different character of a deposition taken for the purpose of perpetuating testimony under Rule 27. The Court of Appeals said that the exercise of the lower court's discretion in terminating the deposition "is akin to the trial court's discretion in limiting the right to cross-examination at trial". The Court of Appeals, therefore, makes no distinction between the problems inherent in a deposition under Rule 27, and the every-day problems of a trial court, including those met upon a deposition taken in pending litigation, i.e. under Rule 26. That distinction is recognized in the Federal Rules where the two situations are treated separately. Rule 27 governs depositions *before action* and Rule 26 deals with depositions *pending action*. Petitioners know of no decided cases in which that distinction is discussed and in which the right of cross-examination under Rule 27 has been given consideration.

In litigation the parties are confronted with issues that are the subject of proof upon the trial of the *pending action*. A trial court's ruling with respect to the extent of an examination by counsel is, therefore, with reference to known issues established by the pleadings.

On the other hand, a deposition under Rule 27 is, as the rule states, a *perpetuation proceeding before action*. There are no litigants since no suit is pending. There are no pleadings, and the expected adverse parties do not know what issues they may be compelled to meet, possibly not until many years later. The perpetuation of testimony is for the purpose of a possible future suit against parties against whom petitioner has alleged she "expects" to bring suit.

Yet there is no requirement under Rule 27 that an action must be brought; and there is no certainty that a petitioner

actually intends to or will institute suit. Hence a court may judicially recognize that a perpetuation proceeding represents in effect the threat of an action that may never be brought. The lower court should have ensured, in the circumstances of the instant proceeding, that the expected adverse parties have full opportunity to ferret out whatever hidden motives exist for the belated claims asserted by respondent against petitioners' vested property. Lacking knowledge of the issues to be met upon trial of an action not yet brought, expected adverse parties must necessarily be accorded wider latitude and greater liberality upon cross-examination than is required by a party in a pending action.*

III.

A further reason for granting the writ is that the orders of the District Court appealed from convincingly demonstrate prejudicial errors which may have had the effect of depriving petitioners of their day in court. These errors contrast sharply with and therefore negate the District Court's preamble in its memorandum and order of February 23 that "the records and briefs in this case have been examined with care" (R. 137).

Respondent's motion before the court had a two-fold purpose: (a) to terminate the deposition, and (b) to determine the fee and disbursements to be paid by respondent to petitioners' counsel.

The errors committed by the court comprise: (1) the court's failure to recognize the nature of a proceeding under Rule 27, by assuming that an action had already

---

* *Cf.* 4 Moore, Federal Practice (2d ed.) Sect. 27.09 favors a more liberal standard of materiality and competency since the issues in a perpetuation proceeding are less well defined; citing with approval *Arizona* v. *California* (1934), 292 U. S. 341, 360, 54 Sup. Ct. 735, 78 L. Ed. 1298.

been brought by respondent against petitioners (R. 138, 139); (2) the court's erroneous assumption that petitioners were the moving parties upon respondent's motion to determine the amount of fee (R. 136); and (3) in terminating the deposition, the court's false assumption that respondent had contended that part of the fee of petitioners' counsel "should be carried by the Government" (R. 137). On the Attorney General's motion for resettlement and modification of this prejudicial order, the court corrected the same to read that "the Attorney General is in no way finally liable for the expenses surrounding the taking of the deposition" (R. 139).

Upon the Attorney General's motion petitioner pointed out that since this was a Rule 27 proceeding and there was, therefore, no action pending between the parties, it was pointless to defer the determination of the fee of petitioners' counsel by saying that this "may be determined from the hearing subsequent to trial (sic)" (R. 138). Nevertheless, the court's order of March 15 adhered to its earlier determination and ordered that the amount of counsel's fee "be fixed either subsequent to trial (sic) or subsequent to the taking of testimony in a hearing to be held upon the filing of an appropriate motion" (R. 139).

There also was no logic in requiring "an appropriate motion" to be brought*, since the very decision of the court was on respondent's motion then before it for the determination of counsel's fee as well as the termination of the deposition.

Petitioners have been forced to the reluctant conclusion that the records and briefs have not been examined with care by the District Court. They appealed from these orders to secure that consideration of the facts and circumstances of the taking of the deposition which to all appearances was

---

* Another motion was brought by petitioners and the court fixed their counsel's fee at $22,800 and allowed disbursements of $3,459.87. On appeal the Court of Appeals affirmed (R. 573).

denied to them below, and which they submit fairly demonstrate prejudicial error and a substantial denial of justice. The same considerations govern the submission of petitioners' instant petition for a writ of certiorari to the Court of Appeals.

Conclusion

For the reasons set forth above, it is petitioners' respectful submission that this petition for a writ of certiorari should be granted.

July 15, 1957

RALPH G. ALBRECHT,
Counsel for Petitioners.

GERALD J. MCMAHON,
HENRY F. BUTLER,
JOHN GEYER TAUSIG,
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided April 18, 1957

Before PRETTYMAN, FAHY and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* These cases involve appeals from orders of the District Court entered February 23, 1956 (as amended by order of March 15, 1956) and April 30, 1956. Although the record pertaining to these cases is somewhat lengthy, the facts necessary to a determination of these appeals may be briefly summarized.

On May 13, 1955, Mrs. Hugo Stinnes, Sr., a German national and a non-resident of the District of Columbia, filed her petition for an order pursuant to Rule 27 (a) Fed. R. Civ. P. authorizing the taking of her deposition upon oral examination, for the purpose of perpetuating her testimony in support of her claim to certain property presently vested by the Attorney General under the Trading with the Enemy Act.[1]

After certain intermediate proceedings the District Court, under date of June 13, 1955, entered an order, which, among other things, appointed Ralph G. Albrecht as attorney to represent Elsa Wichtendahl de Wagenknecht and N. V. Edmund Wagenknecht's Handel Maatschappij, a Dutch corporation (two of the expected adverse parties within the meaning of Rule 27 (a) (2) Fed. R. Civ. P.)[2]

---

[1] 40 STAT. 411 (1917), 50 App. U. S. C. §§ 1-39 (1952).

[2] The portion of the order appointing Mr. Albrecht reads as follows: "3. Subject to the provisions of Rule 4(b) of the Rules of this Court, Ralph G. Albrecht, Esq., of 501 Fifth Avenue, New York, New York, is hereby appointed as attorneys to represent said Elsa Wichtendahl de Wagenknecht and said N. V. Edmund Wagenknecht's Handelmaatschappij herein within the meaning of Rule 27 (a) (2) of the Federal Rules of Civil Procedure."

Mr. Albrecht had previously represented these parties in connection with certain matters but he testified that he was without authority to accept service on behalf of either of the above named expected adverse parties.

Thereafter, and on July 11, 1955, the District Court entered a further order, consented to by petitioner and all expected adverse parties named in the petition, directing that the deposition be taken in Dusseldorf, Germany, to commence August 15, 1955, and to continue from day to day until completed "provided, however, that in view of petitioner's age and the state of her health, the taking of her deposition may be recessed from time to time as may appear necessary or appropriate to said attorneys; and petitioner is hereby directed to appear at such place and at such time and times and give her deposition . . ." This consent order of July 11, 1955, also provided that petitioner should pay to Ralph G. Albrecht, attorney for the two above named expected adverse parties, a reasonable attorney's fee for his services in connection with the taking of the deposition and all reasonable expenses incurred by him in travel between New York and Dusseldorf and return, and for board and lodging in Dusseldorf incurred in connection with the taking of the deposition. It was further provided that the court would determine the amount of fees and expenses upon completion of the taking of petitioner's deposition.

The taking of the deposition was postponed until August 30, 1955. Petitioner's direct testimony was taken in Germany on August 30, 31, September 2 and part of September 3. Her cross-examination by counsel for the Attorney General[3] commenced September 3 and continued on September 5 and part of September 6. Appellants' counsel then examined the witness on September 6 and

[3] The Attorney General, as successor to the authority, rights, privileges, duties and functions of the Office of Alien Property Custodian, and Atlantic Assets Corporation (represented by the Attorney General) were also named as expected adverse parties.

intermittently on nineteen days thereafter. The record discloses that, at the time of the filing of the petition, petitioner was eighty-two years of age, in bad health, being a chronic sufferer from duodenal ulcers, and, consequently, the daily sessions for the taking of testimony aggregated about two and one-half hours per day. The deposition was taken through an interpreter.

On September 27, 1955, after the cross-examination had lasted thirteen days and part of another, petitioner was ordered by her doctor, because of the adverse effect which the examination was having on her health, to cease testifying and return to the hospital at Hamburg for examination by a specialist who had treated her for many years.

Petitioner, on September 26, 1955, filed a motion in the District Court for an order directing the officer conducting the examination "to cease forthwith from taking said deposition or to cease from taking said deposition after the passage of such further time as may appear reasonable to the Court in the premises, upon the ground that cross-examination of petitioner by said Ralph G. Albrecht, Esq. is being conducted in such manner as unreasonably to oppress the petitioner." At the hearing on the motion, a certificate was presented from her physician since 1929 stating that "to continue the examinations in the manner they have been apparently held" would be dangerous to Mrs. Stinnes' health and life, and that continuance under medical supervision and for a few other sessions would be preferable to postponing the examination to some date in the future. The District Court entered an order dated October 6, 1955, providing in part as follows:

> "(2) The taking of the deposition of the petitioner upon oral examination be resumed at the Universitats-Krankenhaus Eppendorf, Hamburg, Federal Republic of Germany, as promptly after the entry of this Order as arrangements can be made therefor and petitioner's health permits, and shall continue there to be taken until counsel shall complete the same or until to continue to take the same would, in

the written opinion of petitioner's physician be unduly prejudicial to the health of petitioner, whichever occurs first;

"(3) Unless petitioner's physician shall advise the attorneys participating in the taking of petitioner's deposition that longer sessions will not be unduly prejudicial to her health, petitioner's deposition upon oral examination as hereinabove provided shall be taken as heretofore during daily sessions of not more than two and one-half hours each, including a recess of thirty minutes, provided, however, that in view of petitioner's age and the state of her health, the same may be recessed briefly from time to time as may appear necessary or appropriate to the attorneys participating in the taking of petitioner's deposition;

"(4) Should petitioner's physician advise the attorneys participating in the taking of petitioner's deposition that in his opinion the taking of her deposition can continue only for a specified number of additional daily sessions without the same becoming unduly prejudicial to petitioner's health, such attorneys shall thereupon undertake to reach an agreement effecting an equitable allocation among them of the time so specified by petitioner's physician, for her further examination by each of them;

"(5) The Court reserves jurisdiction, after notice to all parties, to enter such Order on petitioner's said motion as may be appropriate in the event that prior to the completion by counsel of the taking of petitioner's deposition, petitioner's physician shall give it as his written opinion that to continue to take her deposition would be unduly prejudicial to petitioner's health. . . ."

The deposition was continued at Mrs. Stinnes' hospital room on October 11, 1955, Mrs. Stinnes being attended by her physician, who, on October 12, 1955, certified that he had attended the October 11 and 12 sessions and stated:

". . . the questioning is detrimental to the patient's health, and, if continued for too long a time, the stress caused by it could result in an urgent complication of the ulcer (perforation or hemorrhage). The perfora-

> tion would endanger Mrs. Stinnes' life seriously because it would include a surgical intervention. In an age of nearly 83 years the risks of such a progeciure are obvious, and equally in the case of hemorrhaige. So I have given Mrs. Stinnes sedatives to relieve the stress, but notwithstanding their effect the examination continues to threaten her health."

He then concluded that, in his opinion, five daily and consecutive sessions of actual questioning of not more than two hours would be the maximum without seriously endangering the health and possibly the life of Mrs. Stinnes. Accordingly, the cross-examination continued October 13, 14, 15 and 16, on which date her deposition was suspended on the order of her physician.

By notice filed November 28, 1955, the motion of September 26, 1955, for an order terminating the taking of the deposition was calendared. On November 28, 1955, petitioner applied for an order determining the amount to be allowed Mr. Albrecht for travel and other expenses and the amount, if any, of the attorney's fees to be paid by petitioner. On February 23, 1956, the court entered its order, holding, among other things:

> "Believing that the examining parties have had fair and ample opportunity to go into the matters in controversy despite difficult circumstances, and being of the opinion that further cross examination of petitioner would be oppressive, the deposition will be terminated by the Court. If, as a consequence, the deposition is rendered incomplete, such fact may be called to the attention of the Court when it is offered in evidence, so that it may be evaluated properly."[4]

The expected adverse parties, Elsa W. de Wagenknecht and N. V. Edmund Wagenknecht's Handel Maatschappij, duly appealed. This appeal is No. 13,457 in this court.

---

[4] The court entered an amending order, dated March 15, 1956, which did not affect so much of the order of February 23, 1956, as terminated the taking of the deposition.

On the question of Mr. Albrecht's fees and expenses, he requested a fee in the amount of $30,400.00, expenses in the amount of $3,459.87, and an allowance of $1,698.70 for fees and disbursements of his Washington associate. A hearing on the question of fees and expenses was held before a judge of the District Court other than the judge who ordered termination of the deposition and, at the conclusion of the hearing, Mr. Albrecht was awarded a fee of $22,800.00 and expenses of $3,459.87. The claim for his Washington associate was disallowed. This order was dated April 30, 1956, and from this order Mrs. Stinnes appealed. Mr. Albrecht did not cross-appeal this order. The appeal relating to Mr. Albrecht's fees and expenses is No. 13,458 in this court.

Appeal No. 13,457

Section 30(d) of the Federal Rules of Civil Procedure provides as follows:

> "*Motion to Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable."

Consistently with this rule, the District Court, on examination of the record, concluded that the examining parties had had fair and ample opportunity to go into the questions in controversy and found that further cross-examination of petitioner would be oppressive.

The matter of limiting or terminating the taking of a deposition is in the sound discretion of the court. *United States ex rel. Edelstein* v. *Brussell Sewing Mach. Co.*, 3 F. R. D. 87 (S. D. N. Y. 1943);[5] *Walsh* v. *Pullman Co.*, 10 F. R. D. 77 (S. D. N. Y. 1948); 2 Moore, Federal Practice & Procedure 2575.[6] The exercise of this discretion is akin to the trial court's discretion in limiting the right to cross-examination at trial, the exercise of this discretion being ground for reversal only when the trial judge has abused the discretion allowed him. See *Rea* v. *Missouri*, 84 U. S. 532 (1873); *Kight* v. *Metropolitan Railroad Co.*, 21 App. D. C. 494 (1903); *Tuchtman* v. *Connelly*, 106 F. 2d 501 (6th Cir. 1939).

Under the facts in this record we are convinced there was no abuse of discretion when the trial court granted the motion terminating the witness's deposition. We agree that greater latitude is permitted in the cross-examination of a party than might be the case with non-party witnesses. *Rea* v. *Missouri*, *supra*; *Jansson* v. *Larsson*, 30 App. D. C. 203 (1907); *Alderman* v. *United States*, 31 F. 2d 499 (5th Cir.), *cert. denied*, 279 U. S. 869 (1929). But, even with this in mind, we can find no error in granting the order here attacked. Those cases which require a movant under Rule 30(d) to make a clear showing of annoyance, embarrass-

---

[5] In this case the court stated: "The power of the court to prevent abuse of its process is very broad, before the examination under Rule 30 (b) and during the course of the examination, Rule 30 (d)." 3 F. R. D. at 88.

[6] Prof. Moore asserts: "If the *court is satisfied* that a protective order is necessary, it will issue an order which governs the examination with respect to the matters within the scope of the order." [Emphasis supplied.]

ment, oppression or the like[7] are satisfied by the facts in this record.

Believing that there had been fair and ample opportunity to cross-examine the witness and to develop information relevant to the controversy, and considering the advanced age of the witness, the delicate state of her health and the probable adverse affect upon her health of further cross-examination, we conclude that it was clearly proper to terminate her cross-examination.

The order of February 23, 1956 (as amended by the order of March 15, 1956) will be affirmed.

Appeal No. 13,458

In the matter of the fee allowed Mr. Albrecht[8] we are unable to say that the District Judge abused his discretion. We are no more empowered to try the question of fee *de novo* or sit as a *nisi prius* court in that regard than in the case of the termination of the deposition. Our obligation is to determine whether the District Court abused its discretion and we cannot say that there was such abuse in this case.

Mrs. Stinnes argues that, as the cross-examination was for the benefit of Mr. Albrecht's clients, a part of his fee should be paid by them. The short answer to this is that the petition for perpetuation of testimony was instituted by Mrs. Stinnes. Appellees gave notice that they would oppose the petition and this position was abandoned only upon the signing of the consent order on July 11, 1955, by which Mrs. Stinnes agreed, among other things, to pay a

---

[7] *Schwartz* v. *Broadcast Music, Inc.*, 16 F. R. D. 31 (S. D. N. Y. 1954); *Laverett* v. *Continental Briar Pipe Co.*, 25 F. Supp. 80 (E. D. N. Y. 1938).

[8] Although Mrs. Stinnes also appealed the allowance for expenses named by Mr. Albrecht, this part of her appeal has been abandoned.

reasonable attorney's fee to Mr. Albrecht in connection with the taking of petitioner's deposition and all reasonable expenses in connection therewith.

The order of April 30, 1956, will be affirmed.

Order of February 23, 1956 (as amended by order of March 15, 1956) is affirmed.

Order of April 30, 1956 is affirmed.

Federal Rules of Civil Procedure for the United States District Courts

---

Rule 26. Depositions Pending Action

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other

party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Examination and Cross-Examination.

* * *

(d) Use of Depositions.

* * *

(e) Objections to Admissibility.

* * *

(f) Effect of Taking or Using Depositions.

* * *

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he

expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so

taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 26(d).

(b) Pending Appeal.

* * *

(c) Perpetuation by Action.

* * *

Rule 30. Depositions Upon Oral Examination.

* * *

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

* * *

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.